

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 16, 2007 Session

RANDY DILLARD v. BRANDY LYNN JENKINS

Appeal from the Juvenile Court for Polk County
No. J-3551 Billy D. Baliles, Judge

No. E2007-00196-COA-R3-CV - FILED SEPTEMBER 18, 2007

Following the end of a seven-year relationship with Mother, Father filed a Petition for Paternity and Custody/Visitation to establish his paternity of the couple's daughter and to be designated as her primary residential parent. The parties agreed that Father was the Child's biological father. Following a hearing in 2003, the trial court entered a Temporary Order, granting temporary custody to Mother, ordering home studies of both parents' residences, and staying further matters for a later hearing. More than two years later, the trial court held another hearing. After hearing the parties' evidence, the trial court stated that the issue was whether a change of custody should be ordered, as the initial custody determination had already been made at the 2003 hearing. The trial court concluded that evidence of Mother's drug addiction was not sufficient to justify a change of custody and therefore denied Father's request for custody. The trial court did not make a finding of paternity, although it did order Father to pay child support, Mother's attorney's fees, and court costs. Father appeals. After careful review, we conclude that the trial court erred by not entering an order establishing Father as the Child's biological father. We further hold that the trial court applied an incorrect legal standard in making the initial custody determination in this case. As a result, we reverse and remand for entry of an order of paternity and a new trial on the issue of custody.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

William J. Brown, Cleveland, Tennessee, for the Appellant, Randy Dillard.

Barrett T. Painter, Cleveland, Tennessee, for the Appellee, Brandy Lynn Jenkins.

OPINION

I. Background

Randy Dillard (“Father”) and Brandy Lynn Jenkins (“Mother”) met in 1996 through mutual friends and began a relationship. Mother gave birth to Tristan Paige Dillard (the “Child”) on December 17, 1999. Mother and Father agree that Father is the biological father of Tristan. Although the parties never married or cohabited, they remained together until late 2002. Shortly after the break-up, Father filed a Petition for Paternity and Custody/Visitation on January 2, 2003, in which Father sought an order establishing him as the Child’s biological father and primary residential parent. Father alleged that Mother had denied him visitation with the Child since he and Mother stopped seeing each other and alleged that Mother was an unfit parent. In her answer and counter-petition, Mother acknowledged that Father was the biological father of the Child, but denied the remainder of Father’s allegations and sought dismissal of his petition.

Following a hearing in this case, the trial court entered an order on April 21, 2003, granting temporary custody of the Child to Mother and allowing Father regular visitation. The Temporary Order also required both parties to submit to a home study by the Department of Children’s Services. There is no evidence in the record that the home studies were ever completed, nor does the record contain a transcript of the hearing.

On August 19, 2005, Father filed an answer to Mother’s counter-complaint and sought to amend his petition to reflect additional acts that had occurred since the filing of his original petition. In his verified motion to amend, Father alleged that Mother denied him visitation with the Child, that Mother was in an abusive relationship with a convicted felon, and that Mother was both physically and mentally unable to care for the Child. Father sought custody of the Child with supervised co-parenting time granted to Mother. There is no order in the record ruling upon Father’s motion to amend his petition.

On January 9, 2006, Father filed a Motion for Emergency Removal of Child, requesting that he immediately be granted temporary custody of the Child. In the motion, Father alleged that Mother had been charged with assault and a warrant issued for her arrest, and that Mother’s boyfriend was incarcerated in Georgia. Again, there is no indication in the record that a hearing was ever held regarding this motion filed by Father, although a few months later the parties did submit an agreed order allowing inspection and copying of medical and pharmaceutical records for the Child.

The trial in this matter was conducted on September 27, 2006, nearly four years after Father filed his petition. The trial court entered an order denying Father’s request for custody on November 15, 2006. The trial court treated the hearing as a petition to change custody of the Child from Mother to Father, not as an initial custody determination and petition to establish paternity, as Father

had requested in his petition.¹ The trial court did not make a finding of paternity in this case, although the trial court referred to Mr. Dillard as “Father” throughout both the Temporary Order entered in 2003 and the November 15, 2006, order. In its order, the trial court found that Mother was addicted to prescription pain medication, but that the addiction did not justify a *change* of custody, stating as follows:

In determining a change of custody, the Court finds that a parent’s disability must interfere with the care of the child and it must be proven that the child is neglected. The Court finds that Mother’s disability does not interfere with her care of the child and the child is not neglected, and there have been no complaints filed with the Department of Children’s Services regarding Mother. Therefore, the Court finds that the issues raised by Father are not sufficient to change custody and that it is in the child’s best interest that Mother shall remain as the primary residential parent of the residential parent of the minor child.

The trial court ordered Mother to attend either drug counseling or Narcotics Anonymous one time per week. The trial court also stated that “[Father] has impressed the Court with his desire to parent the child,” and accordingly, awarded him additional co-parenting time with the Child. Father was also ordered to pay Mother’s attorney’s fees and the court costs. Father appeals.

II. Issues Presented

Father has presented the following issues on appeal, which we restate as follows:

1. Whether the trial court erred by failing to establish Father’s paternity of the Child.
2. Whether the trial court erred by applying the “material change of circumstances” standard to an initial determination of custody.
3. Whether the trial court erred by failing to designate Father as the Child’s primary residential parent and grant him custody of the Child.

III. Analysis

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court’s determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses,

¹This error may have been due to the protracted nature of this case. The record does not indicate why the case remained inactive for so long following entry of the Temporary Order on April 21, 2003.

especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

As the Supreme Court has noted on several occasions, trial courts are vested with wide discretion in matters of child custody. *Eldridge v. Eldridge*, 42 S.W.3d at 85; *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988). A determination of custody and visitation often hinges on subtle factors such as the parents' demeanor and credibility during the trial proceedings. *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). Absent some compelling reason otherwise, considerable weight must be given to the trial court's judgment with respect to the parties' credibility and their suitability as custodians of children. *Bush v. Bush*, 684 S.W.2d 89, 94-95 (Tenn. Ct. App. 1984). In cases such as this, the welfare and best interests of the child are of paramount concern. Tenn. Code Ann. § 36-6-106(a); *Koch v. Koch*, 874 S.W.2d at 575.

A. Paternity

Father contends that the trial court erred by failing to establish his paternity of the Child, as this was the crux of Father's petition. The General Assembly has set forth specific information that must be included in a finding of paternity, none of which was included in any order entered by the trial court in this case. *See* Tenn. Code Ann. § 36-2-311. Mother and Father both admit that Father is the biological father of the Child, and Mother concedes in her appellate brief that Father's paternity should have been established by the trial court. Father testified that he attended the Child's birth, helped Mother care for the Child, and provided financial support for both Mother and the Child. The trial court consistently referred to Mr. Dillard as "Father" in its orders and during the September 27, 2006, hearing. Furthermore, the trial court ordered Father to pay child support, in spite of its lack of a paternity finding. Taking the evidence as a whole, we find that the trial court erred by not establishing Father's paternity and vesting him with the legal rights of a parent. Therefore, on remand, we order the trial court to enter a finding of paternity in accordance with Tenn. Code Ann. § 36-2-311.

B. Trial Court's Use of "Change of Custody" Analysis

Father asserts that the trial court erred by considering this case as a request for a change of custody, rather than an initial custody determination. Mother asserts that if an incorrect standard was applied by the trial court, it was harmless error to do so. We disagree.

When making an initial custody decision, a trial court must "determine a child's best interests in light of the comparative fitness of the parents." *In re C.K.G.*, 173 S.W.3d 714, 732 (Tenn. 2005). The General Assembly has set forth a list of factors that a trial court may consider in the best-interest analysis if they are relevant to the case at hand. *See* Tenn. Code Ann. § 36-6-106(a). If a parent seeks a modification of an existing custody arrangement, rather than an initial custody determination,

however, the threshold inquiry is whether a material change in circumstance has occurred. Tenn. Code Ann. § 36-6-601(a)(2)(B); *see also Cowan v. Hatmaker*, No. E2005-01433-COA-R3-CV, 2006 WL 521492, at *4 (Tenn. Ct. App. E.S., filed March 3, 2006); *Harris v. Harris*, 832 S.W.2d 352, 353 (Tenn. Ct. App. 1992); *Woodard v. Woodard*, 783 S.W.2d 188, 189 (Tenn. Ct. App. 1989). As we have previously stated, “[I]n cases involving a change in custody as opposed to an initial custody determination, a trial court does not reach the best interest analysis until and unless there is first a finding that there has been a material change in circumstances.” *Mulkey v. Mulkey*, No. E2004-00590-COA-R3-CV, 2004 WL 2412610, at *5 (Tenn. Ct. App. E.S., filed Oct. 28, 2004). Thus, contrary to Mother’s assertion, there is a significant difference between the analysis employed by a trial court when making an initial custody determination or considering a petition for change of custody, and the differing analysis could easily produce a different result by the trial court. Therefore, we must decide whether the trial court correctly decided this case as a petition for a change of custody.

After the September 27, 2006, hearing, the trial court stated that it was not adjudicating the issue of custody for the first time, instead asserting that it had made the initial custody determination following a hearing on March 10, 2003. Although the 2003 order was captioned a “Temporary Order,” the trial court ascribed the order’s “temporary” designation to an error of the drafting attorney, stating as follows:

Gentlemen, I understand all the issues. I heard this case for about four hours with [the parties’ former attorneys] and, yes, we did have a custody hearing. I don’t care what they called the order. . . . The attorneys got the names on the orders mixed up, but I assure both of you we had a complete custody hearing here. And it was lengthy and at times hostile.

The trial court then concluded that Mother’s health problems and her significant use of pain medication did not warrant a change of custody to Father.

The “Temporary Order” which the trial court referred to as an initial custody determination was entered on April 21, 2003, and stated in pertinent part as follows:

[I]t is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That the Mother shall be awarded the temporary primary residential custody of the parties’ minor child . . . subject to the Father’s shared parenting time as set forth in the attached Temporary Parenting Plan.² Said plan is incorporated herein and the parties are to abide by said terms.

²Although a temporary parenting plan may have been prepared by the parties’ attorneys or the trial court, it was not entered into the record.

2. That neither party shall consume alcohol to excess or consume any illegal substance while the minor child is present for the purpose of visitation. That neither party shall have any overnight guests of the opposite gender, that is a non-family member, while the minor child is present for the purpose of visitation.

3. That a home study shall be performed by the Department of Children [sic] Services on the Mother's residence as well as the Father's residence. The results of said study shall be filed with the Clerk of this Court, and upon said study being completed this matter shall be brought back before this Honorable Court for final hearing.

4. That all other issues are held in abeyance until further hearing in this matter.

It is clear upon reading the Temporary Order that the order was not intended to be a final adjudication of custody. The document contains repeated references to its temporary nature and the fact that the trial court would have a final hearing at a later date. Although the trial court may not have intended to leave the custody issue open for future adjudication, the trial judge did in fact sign the Temporary Order. As we have acknowledged numerous times, "No principle is better known than that which states that a Court speaks through its orders and decrees entered upon the minutes of the Court." *Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977). Therefore, we conclude that the Temporary Order entered on April 21, 2003, was, as its name implies, temporary in nature, and that the trial court did not make a permanent custody determination at that time. This finding prompts the necessary conclusion that the trial court applied an incorrect standard during the September 27, 2006, hearing. Instead of considering the matter as a request for modification of custody, the trial court should have heard the matter as an initial custody determination. As a result, we must reverse the trial court's custody decision and remand this matter to the trial court so that Father's petition for custody may be decided under the proper legal standard. Because of the necessity for remand, the third issue raised by Father – whether the trial court erred by failing to designate him as primary residential parent and grant him custody – is pretermitted.

IV. Conclusion

After careful review, we hold that the trial court erred by not establishing Father's paternity of the Child in accordance with Tenn. Code Ann. § 36-2-311. We further hold that the trial court incorrectly applied the criteria for a change of custody when it should have used the analysis applicable for an initial custody determination. Accordingly, we reverse and remand. Because of our findings above, we also reverse the trial court's award of attorney's fees to Mother and the assessment of court costs against Father. On remand, the trial court shall enter an order establishing Father's paternity as required by Tenn. Code Ann. § 36-2-311; order home studies of the parties' residences to be conducted by the Department of Children's Services, as was initially set forth in the Temporary Order; and conduct a new trial in order to make an initial custody determination. After

hearing the evidence presented at the new trial, the trial court shall apply the factors set forth in Tenn. Code Ann. § 36-6-106 to determine the parties' comparative fitness as parents in order to establish a custody arrangement that will be in the best interest of the Child. In the meantime, the current visitation arrangement as set forth in the trial court's November 15, 2006, order, shall remain in effect, pending further hearing by the trial court. Exercising our discretion, the parties shall bear the costs of appeal equally.

SHARON G. LEE, JUDGE